1989

Tom Hooker and Sandy Thomas v. Stan Warren, an individual, and Property Consultants Realty, a partnership : Brief of Respondent

Utah Court of Appeals

Steve C. Vanderlinden; Attorney for Respondents.
Michael F. Olmstead; Attorney for Appellants.

IN THE COURT OF APPEALS OF THE

STATE OF UTAH

TOM HOOKER and SANDY THOMAS, Plaintiffs-Appellants, v. STAN WARREN, an individual, and PROPERTY CONSULTANTS REALTY, a partnership, Defendants-Respondents.	BRIEF OF RESPONDENTS COURT OF APPEALS NO. 890194-CA

Brief of Respondents

Appeal from the Judgment of the Fourth

Circuit Court in and for Davis County, Layton Department

Honorable K. Roger Bean

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Brief of Respondents

JURISDICTION AND NATURE OF PROCEEDINGS BELOW

Pursuant to Rule 3(a) of the Rules of the Utah Court of Appeals, the Utah Court of Appeals has proper jurisdiction of this case. In the proceedings below, the Honorable K. Roger Bean of the Fourth Circuit Court, entered final judgment in favor of Respondents (hereinafter referred to as Landlords) on their Counterclaim and against Appellants (hereinafter referred to as Tenants) in the amount of $6,325.00 for damages to the property, $724.00 in unpaid rent, $1,435.00 attorney's fees, and court costs of $5.00 for a total judgment of $8,489.00.

STATEMENT OF ISSUES

1. Whether the trial court erred in its determination that the proper measure of damages are only 50% of the total costs incurred by Landlord to prepare the leased property for new tenants after Tenant breached his lease agreement?

2. Whether the formal Findings of Fact and Conclusions of Law, not the Minute Entry, satisfies the requirements of Findings of Fact and Conclusions of Law pursuant to Utah R.Civ. P. 52(a)?

STATEMENT OF THE CASE

Tenants brought an action in the Small Claims Court claiming that the Landlords failed to return a security deposit. Landlords filed a counterclaim against Tenants for damages caused by Tenants' breach of the lease agreement. Since the counterclaim was for an amount in excess of the Small Claims Court's jurisdiction, the case was transferred to the Second Circuit Court, Davis County, Layton City Department.

Later, Tenants filed a Reply to the Counterclaim and Landlords filed an amended counterclaim after which a pre-trial conference was held. This case was brought to trial on August 15, 1988, without a jury, with Honorable K. Roger Bean presiding.

At the end of the trial, Judge Bean found that the Tenants had committed an "anticipatory breach" of the lease and the issues were found in favor of Landlords on their counterclaim (R. 154). However, the court took under advisement the issue as to the proper measure of damages (R. 163).

Both sides submitted memoranda concerning the issue of damages and thereafter, the Court entered a Minute Entry (Exhibit B), Judgment (Exhibit E), and Findings of Fact and Conclusions of Law (Exhibit C). Damages were awarded as follows: $6,325.00 (costs for repairs), $1,435.00 (attorney's fees), $724.00 (lost rents), and $5.00 (court costs) for a total amount of $8,489.00.

Appellants then filed this Notice of Appeal (R. 63, 64).

STATEMENT OF FACTS

On or about April 9, 1986, the Tenants individually and collectively entered into a lease with Landlords to lease offices in a building at 1513 North 400 West, Unit #2, Layton, Utah. (R. 6-8, 29-30, 44-45)

Prior to the entering of the lease agreement, the leased property was brand new, "just a shell." (R. 82) Tenants specified how the interior of the premises were to be built which included six-foot high interior walls, and special phone lines to accommodate Tenants' telephone system (R. 63-64 33-36). Such specifications along with general improvements (sheetrocking of exterior walls, paint and carpeting) were completed by Landlords prior to the time the lease commenced. (R. 82, 83).

Tenants agreed, pursuant to the lease agreement to lease Unit #2 at 1513 North 400 West, Unit #2, Layton, Utah, for a period of three years beginning April 5, 1986 until the last day of April, 1989 for $750.00 per month for the first year and $790.00 per month for the second and third years of the lease. (R. 9, 30).

On or about March of 1987, Tenants willfully and intentionally breached their lease agreement with Landlords. (R. 10, 31, 61).

When the Tenants vacated the leased premises, the premises were damaged so that extensive repairs needed to be made. (R. 93-125). Landlords hired subcontractors and bought materials in order to repair the premises and prepare the premises for the a new tenant for a total cost of $12,649.32. (R. 32, 35, 64, 65, 66, 91, 92, 95, 96).

Soon after Tenants vacated, Landlords relet the leased property. There were five weeks from after the Tenants vacated until the new tenant moved in. (R. 93-125).

Tenants initiated an action in small claims court to recover the security deposit. Landlord counterclaimed against the Tenants on the basis that the Tenants breached the lease agreement. The case was transferred to the Circuit Court because the total amount of the claim exceeded the small claims court's jurisdiction.

At trial, Landlords submitted evidence regarding the breach and also evidence regarding damages. At the end of the trial, the court found in Landlords' favor and found that Tenants committed an "anticipatory breach" of the lease agreement and that Tenants were responsible for damages. (R. 154). The court was unsure what measure of damages was appropriate and the issue on advisement. (R. 163).

In the formal Findings of Fact the court found that Landlords "spent $12,649.32 to fix up the real property previously, leased" by Tenants, and that "50% of the Defendants' [Landlords'] improvements were for general improvements of the premises for [sic] another tenant and not expended as a result of the lease

between the parties." (Exhibit C). The trial court entered judgment in favor of Landlords for $6,325.00 to fix up the property, plus $724.00 for lost rentals, $1,435.00 for attorney's fees, and court costs of $5.00, for a total judgment of $8,489.00. (Exhibit A, B p. 2, C p. 3).

SUMMARY OF ARGUMENT

Tenants bring this appeal claiming the trial court incorrectly assessed damages pursuant to Tenant's breach of the lease agreement. In light of a new Utah Supreme Court case, the Tenants arguments regarding the award of damages and the lower court's award for damages are in error. In Reid v. Mutual of Omaha Insurance, 110 Utah Adv. Rep. 12 (1989) the correct measure of damages when a commercial lease has been breached is set forth. In Reid, the court places an affirmative duty of mitigation on the landlord. If the landlord has fulfilled his duty to mitigate, then the landlord is entitled to damages. The damages equal lost rent, costs, attorney's fees, if appropriate, and the cost to repair the premises and alter it according to the requirements of a new tenant.

The trial court did not use the standard set forth in Reid to determine damages. The lower court submitted a Minute Entry concerning the judge's ruling on damages. (Exhibit B). The court formalized the opinion in a formal Findings of Fact and Conclusions of Law. (Exhibit C). In the formal Findings, the court found that $12,649.32 was spent by the Landlords to fix up the property after the breach and subtracted $6,325.00 for general improvements made

for another tenant, and awarded $6,325.00 for repairs.

The lower court correctly awarded damages to the Landlords for the repairs, but the court did not go far enough. According to Reid, damages should include both the cost to repair the premises and also the costs to alter the premises for the new tenant. In light of the new Supreme Court decision, the lower court erred in not including the $6,325.00 required to prepare the premises for the new tenant. In Reid the court states that "so long as the expenses incurred in the process of reletting, or attempting to relet the property are commercially reasonable, they should be borne by the breaching tenant. Id. at 17.

Because of Reid, the proper award of damages should include both the cost to repair the premises ($6,325.00) and the cost to alter the premises for the new tenant ($6,325.00).

Landlord submits that Reid is controlling in this case and because of such this court should find the lower court erred in its determination of damages and find that the proper damages which should be awarded to Landlords should be $12,649.32 plus lost rents of $724.00, costs of court and attorney's fees.

ARGUMENT

POINT I.

TENANT'S OBJECTIONS TO THE COURT'S FINDINGS ARE WITHOUT MERIT

The Formal Findings of Fact and Conclusions of Law, not the Minute Entry, Fulfills the Requirements of Utah R.Civ.P. Rule 52

The formal Findings of Fact and Conclusions of Law satisfy Rule 52(a) and should be considered the proper Findings of Fact and Conclusions of Law reviewed through this appeal.

Tenants (Appellants) attack the Findings based on several arguments: 1) the Findings were filed late; (Appellants Brief p. 7). 2) the words in the Findings different slightly from the words in the Minute Entry (Appellants Brief p. 6-9); and 3) Landlords have waived their right to submit formal Findings of Fact and Conclusions of Law. (Exhibit A). Also, Tenants allude to the possibility that the late filing of the Findings has affected their opportunity to object to the Findings.

Tenants arguments against the Findings are unfounded. First, untimely filing of Findings of Fact and Conclusions of Law does not create reversible error except as set forth by strict standards. In Ellison v. Johnson, 18 Utah 2d 374, 423 P.2d 657 (1967) the court determined that the failure of the lower court to file the finding of fact and conclusions of law until nineteen days after entry of judgment was not reversible error unless the complaining party proved that judgment would have been any different had filing been prompt.

Tenants, have not met this test. Tenants have not alleged nor proven that the judgment would have turned out differently had the Findings been filed timely.

Second, the Tenants attack the Findings because the wording of the formal Findings and the Minute Entry differ slightly. This argument is without merit. The Findings were sent to Judge Bean for his review, and he found them to be an accurate statement of

the court. Judge Bean has attested by his signature, that the Findings correctly state the court's opinion. Otherwise, Judge Bean never would have signed them.

Third, although not alleged in Tenant's brief, Tenants alleged in Plaintiffs (Tenants) Objections to Findings of Fact and Conclusions of Law (Exhibit A). Tenants claim that "Defendants waived the right to submit formal Findings of Fact and Conclusions of Law by submitting a Judgment signed and entered by the Court on or about February 10, 1989." (Exhibit A). Tenants have not submitted case law which supports this argument, and therefore perhaps the Tenants no longer want to object to the Findings based on this argument or perhaps Tenants believe that support is not necessary. Support for Tenants waiver argument is required and without such the issue should not be considered on appeal.

Fourth, Tenants allude to the possibility that the late filing of the Findings has affected their opportunity to object to the Findings. Tenants have an unlimited opportunity to object to the Findings now through the appeal process. However, Tenants, who now have the opportunity to object to the Findings, have chosen to point out insignificant problems with the Findings, e.g., Tenants object to the Findings based on the different ways that the formal Findings and the Minute Entry characterizes certain damages which were not included in the judgment.

Tenants object to the different wording except to state that

such a differenct "leave[s] this writer [Tenants] wondering if the trial court has even applied the correct measure of damages." (Appellant's Brief p. 9). The correct measure of damages is not changed because two documents use different names to describe amounts that the trial court chose to exclude from damages, but rather, in this case, the correct measure of damages is determined by a recent[1] case directly on point.

Tenants' arguments attacking the formal Findings of Fact and Conclusions of Law are without merit. First, late filing does not affect the Findings of Fact unless it is proven that the judgment would have turned out differently had the findings been filed promptly. Tenants have not done this. Second, Tenants cannot argue that the Findings do not correctly state the lower courts findings regarding the case. The formal Findings of Fact were signed by Judge Bean, and by his signature, he has attested that they correctly state the opinion of the court, regardless of other documents. Third, Landlords have not waived their right to have the formal Findings of Fact considered by this court. Since Tenants have unsupported their argument on waiver it should not be considered on this appeal. Fourth, Tenants have not been denied an opportunity to object to the Findings. Tenants have an unlimited opportunity through this appeal. Therefore, Tenants objections to the Findings are without merit and the formal Findings of Fact and Conclusions of Law should be considered the proper Findings of Fact and Conclusions of Law reviewed through this appeal.

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[1] Reid v. Mutual of Omaha Insurance Company, 110 Utah Adv. Rep. 12 (1989) filed June 12, 1989.

POINT II.

THE CORRECT MEASURE OF DAMAGES INCLUDES THE COST TO ALTER THE PREMISES FOR THE NEW TENENT, COSTS FOR REPAIRS AND ACCRUED RENTS

A recent Utah Supreme Court case has settled the issue before this court concerning the proper measure of damages when a commercial tenant is found to have breached his lease agreement. In Reid v. Mutual of Omaha Insurance, 110 Utah Adv. Rep. 12 (1989) Mutual (as tenant) entered into a five-year lease agreement with Reid (landlord). Mutual took possession of the leased property and less than two years after the lease term began, Mutual vacated the premises. The lower court's ruling that the tenants breached the lease agreement was affirmed and then the Court set forth a detailed method of determining damages when a tenant has breached a lease agreement. This case established the precedent that this court should use in determining the amount of damages.

A. According to Reid v. Mutual of Omaha Insurance, a Landlord Must First Take Active Steps to Mitigate his Damages.

A landlord must first take active steps to mitigate damages prior to his claim for damages. In Reid, the court determined that "a landlord who seeks to hold a breaching tenant liable for unpaid rents has an obligation to take commercially reasonable steps to mitigate its losses, which ordinarily means that the landlord must seek to relet the premises." Id. at 17.

B. Landlords Satisfied their Obligation to Mitigate Damages.

Landlords satisfied their obligation to mitigate damages. The trial record indicates that immediately upon discovery of Tenants' breach, Landlords took active steps to relet the premises.

Landlords' efforts were successful and there was only five weeks in which the premises were vacant. This time would have been shorter but for the necessary repairs and alterations which needed to be made to the premises. Since, Landlords actively sought and successfully obtained a new tenant to occupy the leased property as soon as possible after the breach, the Landlords fulfilled their burden to mitigate. (R. 88, 89).

C. According to Reid v. Mutual of Omaha Insurance, the Landlord Must Prove the Amount of Damages.

Landlords met its burden of proving damages as required by Reid. In Reid the court stated that the landlord has the burden of proving the amount of damages. Reid v. Mutual of Omaha Insurance, 110 Utah Adv Rep. at 17.

D. Landlords Satisfied their Burden to Prove Damages.

The Landlords have satisfied their burden to prove damages. The lower court accepted the evidence submitted to it during trial and ruled in the Findings of Fact and Conclusions of Law that $12,649.32 was spent by Landlords to fix up the premises after Tenants breached the lease agreement. In the Findings of Fact the court designated that half of that amount was for improvements for the new tenant. (Exhibit C).

A trial court's Findings of Fact will not be set aside unless clearly erroneous. Utah R.Civ. P. 52(a). Henderson v. For-Shor Co., 757 P.2d 465 (Utah App. 1988). Western Special Service District No. 1 v. Jackson Cattle Company, 744 P.2d 1376, 1377 (Utah 1987). A finding is clearly erroneous only if it is against the clear weight of the evidence or the reviewing court otherwise

reaches a firm and definite conviction that a mistake has been made. State v. Walker, 743 P.2d 191, 193 (Utah 1987).

The trial court's Findings of Fact is adequately supported by the trial record. The court received into evidence receipts, invoices and check stubs, etc. and found that $12,649.32 was the amount Landlord spent to repair and alter the premises. The amount submitted at trial include:

Description	Amount	Cite
1. Permit from Layton City for remodeling:	$ 72.60	(R. 98-100)
2. New Carpet:[2]		
Carpet cost	$2,152.00	(R. 4-5)
Labor:	308.00	(R. 93)
3. Repair and paint exterior walls and build new interior walls:	$2,800.00	(R. 124)
4. Lumber for new walls:	$ 992.00	(R. 104, 125)
5. Drywall:	$ 575.00	(R. 103, 121-3)
6. Replace electrical conduits, plugs, receptacles, switches outlet jacks:	$ 383.37	(R. 101-3, 123)
7. Window frames, floor casing, chair molding:	$2,248.00	(R. 105, 125)
8. Painting, wallpaper, staining:	$2,364.00	(R. 105-6, 119-21)
9. Lights:	$ 553.45	(R. 106-7, 118-119)
10. Door Molding:	$ 156.51	(R. 107, 118)

The trial court found that these costs were for repairing the premises and the costs of alterations to the premises which were

[2]The carpet was new at the beginning of the lease term but due to the extent of the damage, the carpet had to be completely replaced. (R. 32, 35, 91, 92)

required by the new tenants. This finding is adequately supported by the record.

During the 11 month tenancy, the Tenants directly damaged the leased premises as follows: cigarette burns in the carpet (R. 35, 89), mildew and water stains on the carpet (R. 35, 61, 90, 91), damage to the phone lines because the phone lines were cut so short that the wiring had to be replaced (R. 64, 65, 66, 96), cuts and holes in the exterior walls (caused by the repeated hitting of the wall with a chair, and nail holes for pictures and fixtures) (R. 62, 95). (See items 1, 2, and 3 on page 12 of this Brief).

Tenants indirectly damaged the premises by requesting that certain unique features be added to the premises which, if remained unchanged, Landlords would have little opportunity to find a subsequent tenant who would lease the premises. Such repairs include: replacing the 6' high walls for walls which reached the ceiling (R. 63), and replacing the electrical wiring and phone system. (R. 63, 64). (See items 3, 4, 5, and 6, on page 12 of this brief.) Damages directly and indirectly caused by the Tenants set forth in the two preceding paragraphs total $7,282.97.

Other costs incurred are those which were required by the new tenant as a condition of the tenancy. (R. 109, 112). See items 7, 8, 9, and 10 on page 12 of this brief). The trial court's Finding that $6,325.00 was spent on repairs and $6,325.00 was spent on alterations necessary for the new tenant is very close to the figure listed above. Therefore the trial court's Finding is adequately supported by the evidence.

Landlord has properly proven its costs to repair and alter the premises. The trial court found that $12,647.32 was spent by Landlords to fix up the premises after Tenants breached the lease agreement. In the Findings of Fact the court designated that half of that amount was for improvements for the new tenant. This figure is adequately supported by the record. Therefore, Landlords have met its obligation to properly prove damages, as required by Reid.

E. According to Reid v. Mutual of Omaha Insurance, After a Landlord meets his Obligation to Mitigate, the Damage Award Must Include Accrued Rents, Costs of Repairs plus the Costs for the Alterations Which are Required by the New Tenant.

The appropriate measure of damages in this case include both the costs incurred to repair the premises and the costs to alter the premises to fit the needs of the tenant, accrued rents, attorney's fees and costs. In Reid the court stated that the damage award must include "rents that have accrued as of the trial date" and also the costs reasonably incurred in readying the property and in reletting or attempting to relet." Id. Such costs may include not only expenses incurred in seeking new tenants, but also costs of repairs or alterations of the premises reasonably necessary to successfully relet them. Id.

The Court recognized that "it is not uncommon for property, particularly commercial property, to be modified to meet the needs of a new tenant. So long as the expenses incurred in the process of reletting, or attempting to relet the property are commercially reasonable, they should be borne by the breaching tenant. Id. See Illinois Landlords' Duty, 34 DePaul L. Rev. at 1058-61. Wanderer

v. Plainfield Carton Corp. 40 Ill. App. 3d 552, 559-60, 351 N.E.2d 630, 637 (3rd Dist. 1976), Wilson v. Ruhl 277 Md. 607, 613, 356 A.2d 544, 548 (1976).

F. The Trial Court Erred in Not Awarding the Landlords Costs for Alterations which were Required by the New Tenant.

The trial court erred in not awarding the Landlords the costs for alterations which were required by the new tenant. The Findings of Fact state that Landlords "spent $12,649.32 to fix up the real property previously leased by Plaintiff's [Tenants]". (Exhibit C). The Findings of Fact also state that "50% of Defendants' [Landlords] improvements were for general improvement of the premises for [sic] another tenant and not expended as a result of the lease between the parties." (Exhibit C). Because of this finding, the court excluded 50% of the costs incurred by the Landlord to fix up the premises since they were improvements for another tenant.

The lower court erred in not including the entire $12,649.32 expended by Landlord to fix up the premises. The lower court should have included the $6,325.00 spent to prepare the premises for the new tenant, according to Reid. The Landlords are entitled to a damage award which includes $12,649.32 for the costs of repairs made on the property and costs to alter the property for the new tenant.

POINT III

APPELLATE COURT CAN GRANT LANDLORD JUDGMENT IN ANY AMOUNT OF WHICH PLAINTIFF IS ENTITLED

Landlord is Entitled to $12,649.32 as Damages For Repair and Alterations of Leased Premises

Utah Rules of Civil Procedure Rule 54(c)(1) states that "every

final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

In Henderson v. For-Shor Co., 757 P.2d 465 (Utah Ct. App. 1988) the court stated that "[s]ubdivision (c)(1) requires trial courts to be liberal in awarding appropriate relief justified by the facts developed at trial. . . .it is necessary only that the relief granted be supported by the evidence and be a permissible form of relief for the claims litigated." Id.

Landlords are entitled to the full amount of damages which the law deems just and proper. It is proper and just in this case that the damages incurred to Landlord, because of Tenants' breach be awarded to Landlord in the full amount allowed by law. Such amount, determined by the guidelines set forth by the Utah Supreme Court in Reid v. Mutual, should include costs to repair the premises plus the costs commercially reasonable to sublease the premises. The proper award for damages is therefore $12,649.32 (costs to repair and costs to alter the premises for the new tenant), plus lost rents in the amount of $724.00, costs of court and attorney's fees.

CONCLUSION

The proper award for damages is set forth in the recent Utah Supreme Court case Reid v. Mutual. In Reid the court held that after the Landlord meets his duty to mitigate, the court shall, upon sufficient proof by the landlord, determine damages which include both costs of repairs needed on the premised plus the cost for alterations necessary to successfully relet the premises.

Landlords have met their burden to mitigate and prove damages. The proper award for damages is therefore $12,649.32 which reflects costs to repair the damage Tenants caused to the premises and also the cost to alter the premises to meet the specifications of the new tenant, plus lost rents in the amount of $724.00, costs of court and attorney's fees.

RESPECTFULLY submitted this 24th day of August, 1989.

STEVEN C. VANDERLINDEN
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to MICHAEL F. OLMSTEAD, Attorney for Appellant, 2650 Washington Blvd., Ogden, Utah 84401, this 24th day of August, 1989.

STEVEN C. VANDERLINDEN
Attorney for Respondent

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SECOND CIRCUIT COURT, STATE OF UTAH

DAVIS COUNTY, LAYTON DEPARTMENT

TOM HOOKER and SANDY THOMAS, Plaintiff, vs. STAN WARREN, an individual and PROPERTY CONSULTANTS REALTY a partnership, Defendant.	:	JUDGMENT Civil No. 873000114

The above entitled matter having come on for trial on the 15th day of August, 1988. The Plaintiffs were present and represented by Michael F. Olmstead. The Defendants were also present and represented by Steven C. Vanderlinden. The Court having heard testimony by both parties and the Court having taken the matter under advisement and each party having submitted briefs in support of the positions and the Court having occasion to review the testimony and the briefs of the parties and good cause appearing hereby ORDERS, ADJUGDES AND DECREES as follows:

1. Defendant is granted Judgment against Plaintiff jointly and severally in the amount of $6,325.00 plus attorney fees of $1,435.00, plus Court costs of $5.00 for a total of $8,489.00, plus interest as allowed by law from the date of Judgment.

EXHIBIT A

DATED this___day of February, 1989.

K. ROGER BEAN
CIRCUIT COURT JUDGE

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Clearfield, Utah 84015
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SECOND CIRCUIT COURT, STATE OF UTAH

DAVIS COUNTY, LAYTON DEPARTMENT

TOM HOOKER and SANDY THOMAS, Plaintiff,	:	AFFIDAVIT IN SUPPORT OF COSTS
vs.	:	
STAN WARREN, an individual and PROPERTY CONSULTANTS REALTY a partnership,	:	Civil No. 873000114
Defendant.	:	

STATE OF UTAH)
:ss.
COUNTY OF DAVIS)

The affiant being duly sworn deposes and states as follows:

1. That he is the attorney in the above entitled action.

2. That he expended total costs of $5.00 as filing fees in the above entitled matter.

DATED this 30th day of January, 1989.

STEVEN C. VANDERLINDEN
Attorney for Defendants

SUBSCRIBED AND ACKNOWLEDGED to before me this 31st day of January, 1989.

Venus G. Hale
NOTARY PUBLIC
Residing In: Layton
My Commission Expires: 8-8-92

NOTARY PUBLIC
My Commission Expires 8-8-92
VENUS G. HALE
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SECOND CIRCUIT COURT, STATE OF UTAH

Davis County, Layton Department

MINUTE ENTRY

TOM HOOKER and SANDY THOMAS
Plaintiffs,

vs.

STAN WARREN, et. al.
Defendants

No. 873000114

Date 12-27-88

Judge Bean

MATTER: DECISION ON MATTER TAKEN UNDER ADVISEMENT

This case was tried August 15 and the issues were found in favor of defendants on their counterclaim. The Court took under advisement the question of damages and asked the parties for briefs as to the proper measure. The last brief was filed September 23. Since then, at every available opportunity, the Court has been seeking to find the rule governing what damages are properly awardable. References to "defendant" mean defendant Warren.

Many cases hold that the proper measure of damages is the difference between the value of the property with the lease and its value without the lease. Others say it's the difference between the lease rent and the fair market (rental) value through the period of the lease plus any other consequential damages caused by the breach. Some cases state it in more general terms, saying it's the amount it takes to place the owner in the position he would have occupied had the breach not occurred. This latter statement more closely expresses the general philosophy of damages followed in our law. The problem comes in applying it to the specific facts in hand, i.e., reducing it to dollars and cents.

Three cases are especially helpful in the "restore to same position" approach:

Ruston v. Centennial Real Estate and Inv. Co., 166 Colo. 377, 445 P.2d 64 (1968)

Family Medical Building, Inc. v. State Dept of Social and Health Services (Wash. 1985) 702 P.2d 459

Schneider v. Gordon (Colo. 1987) 732 P.2d 603

EXHIBIT B

What they boil down to is, when a tenant breaches, the owner has a duty to take steps to mitigate damages and lease to another tenant as soon as is reasonably possible. In order to do that, the owner usually must remodel and prepare the premises to the desire of the new tenant. He is entitled to be reimbursed for expenses incurred to the extent that they are expenses of mitigation and not capital improvements which are likely to be beneficial beyond the term of the new tenant.

The fix-up expenses testified to by defendant (the owner) and his witness totaled $12,649.32. There was no testimony specifying whether a particular expense was mitigation or capital improvement. From an analysis of them, as to amount and kind, the Court concludes that approximately 50% of them were for the particular tenant, and the other half usable for any tenant. Applying that to the testimony, defendant is entitled to reimbursement of $6,325 (rounded).

Additionally, defendant is entitled to rent for part of March, $250, for April, $790, and for one week in May, $184, a total of $1224. Plaintiff is entitled to a credit of $500 in prepaid rent and that leaves net rent due defendant in the amount of $724. Evidence of attorney fees for defendant was in the sum of $1,435, an amount the Court finds to be reasonable in light of the subject matter and nature of the litigation, and the experience of counsel on both sides. When those sums are totaled they reach $8,484. It is pertinent to note also that defendant will receive increased rent from the new tenant in the 24 months remaining on plaintiffs' term amounting to $5,040.

The Court grants judgment for $8,484 plus court costs to defendant on his counter claim, and since a set-off has already been accorded plaintiffs, finds in favor of defendant and against plaintiffs on plaintiffs' complaint.

K. Roger Bean

Judge

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SECOND CIRCUIT COURT, STATE OF UTAH

DAVIS COUNTY, LAYTON DEPARTMENT

TOM HOOKER and SANDY THOMAS, Plaintiff, vs. STAN WARREN, an individual and PROPERTY CONSULTANTS REALTY a partnership, Defendant.	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 873000114

The above entitled matter having come on for trial on the 15th day of August, 1988. The Plaintiffs were present and represented by Michael F. Olmstead. The Defendants were also present and represented by Steven C. Vanderlinden. The court having heard testimony by both parties and the Court having taken the matter under advisement and each party having submitted briefs in support of their positions and the Court having reviewed the testimony and the briefs of each party hereby enters it's:

FINDINGS OF FACT

1. That the Defendants are residents of Davis County and the lease in question was over real property located in Davis County, Utah.

2. That the parties entered into a lease agreement on April 9, 1986 at $750.00 per month to lease units 2 and 3 at 12 South Main, Layton Utah for the 1st year and $790.00 per month for years 2 and 3 of the lease.

3. That Plaintiff tenants breached said lease agreement in March of 1987, with Defendants, by vacating the premises.

4. That Defendants spent $12,649.32 to fix up the real property previously leased by Plaintiff's.

5. That Plaintiffs failed to pay rent in March of $250.00, April $790.00 and one week in May for $184.00.

6. That Plaintiff's had prepaid $500.00 in rent.

7. That the lease agreement specified Defendants could recover attorney's fees and Court costs.

8. That Defendants did in fact hire an attorney in the above matter.

9. That 50% of Defendants' improvements were for general improvement of the premises or another tenant and not expended as a result of the lease between the parties.

CONCLUSIONS OF LAW

1. The Circuit Court had jurisdiction over the above entitled action.

2. Defendant is entitled to and is hereby awarded a judgment of $8,489.00 computed as follows:

a. $6325.00 for expenses incurred by Defendant in improving the leased premises after Defendant vacated the premises.

b. $724.00 in unpaid rent.

c. $1,435.00 attorney's fees.

d. $5.00 Court costs.

DATED this_____day of March , 1989.

K. ROGER BEAN
CIRCUIT COURT JUDGE

NOTICE

TO: MICHAEL OLMSTEAD
2650 WASHINGTON BLVD.
OGDEN, UTAH 84401

You are hereby notified that pursuant to Rule 2.9 you have ten (10) days to file an objection, if any to the foregoing document.

DATED this 7th day of March , 1989.

STEVEN C. VANDERLINDEN
ATTORNEY AT LAW

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing document was served this 6th day of March, 1989 by first class, U.S. mail, postage prepaid upon:

MICHAEL OLMSTEAD
2650 WASHINGTON BLVD.
OGDEN, UTAH 84401

Shaylene K Barth
LEGAL SECRETARY

MICHAEL F. OLMSTEAD #2455
Attorney for Plaintiffs
2650 Washington Boulevard
Suite 102
Ogden, Utah 84401
Telephone No. 621-7613

file

IN THE SECOND CIRCUIT COURT, STATE OF UTAH

WEBER COUNTY, LAYTON DEPARTMENT

TOM HOOKER and SANDY THOMAS, Plaintiffs / Appellants, vs. STAN WARREN, an individual, and PROPERTY CONSULTANTS REALTY, a partnership, Defendants / Respondents,	PLAINTIFF'S OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 873000114

COME NOW the Plaintiffs and object to proposed Findings of Fact and Conclusions of Law as submitted by Defendants with a certificate of mailing dated March 6, 1989.

Plaintiff's objections are predicated upon:

1. The submission was not made within 15 days of the ruling (memorandum decision) of the Court dated December 28, 1988, as required by Rule 2.9(a) of the Rules of Practice of District and Circuit Courts.

2. Defendants waived the right to submit formal Findings of Fact and Conclusions of Law by submitting a Judgment signed and entered by the Court on or about February 10, 1989. In effect, the Defendants relied upon the memorandum decision as constituting Findings of Fact and Conclusions of Law that support the Judgment dated February 10, 1989.

EXHIBIT D

3. Defendants submission, if considered to be a motion to amend or make additional findings under Rule 52(b) URCP, is defective in that they were not submitted within 10 days of the Judgment as required by Rule 52(b).

4. Plaintiffs have filed a timely Notice of Appeal to the Utah Court of Appeals on the record, exclusive of the proposed and submitted Findings of Fact and Conclusions of Law now submitted by Defendants.

DATED this 9th day of March, 1989.

Michael F. Olmstead
MICHAEL F. OLMSTEAD
Attorney for Plaintiffs/Appellants

CERTIFICATE OF MAILING

I hereby certify that on the 9 day of March, 1989, I mailed a true and correct copy of the foregoing PLAINTIFF'S OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW, postage pre-paid, to: STEVEN C. VANDERLINDEN, Attorney for Defendants/Respondents, 360 South State, Suite 3, Clearfield, Utah 84015.

Susan Green
Secretary